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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 799

JONAS A. MILLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

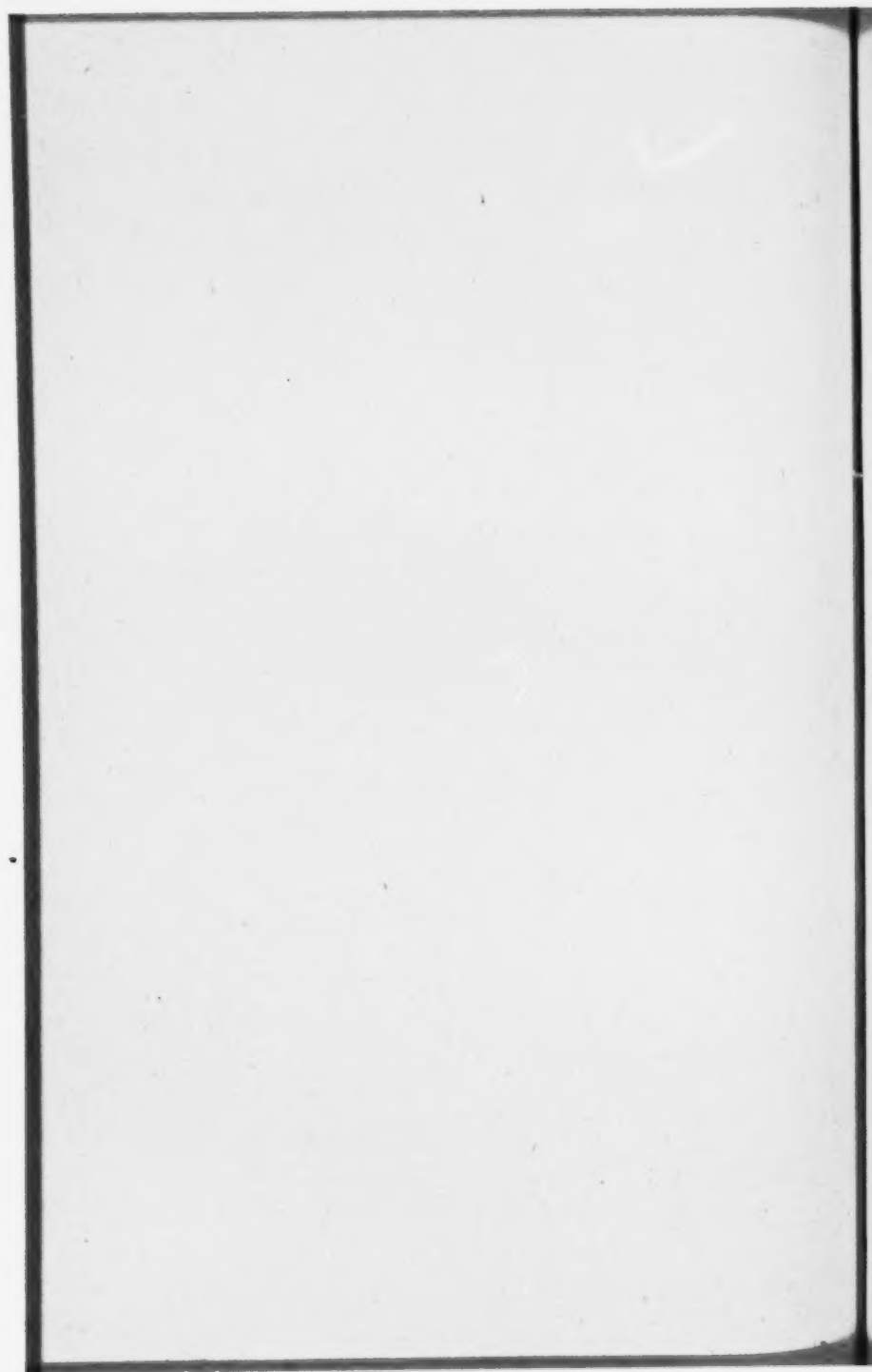
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

The petitioner, Jonas A. Miller, by his counsel, Robert A. Grant, Walter R. Arnold and Charles W. Davis, respectfully petitions this Honorable Court to issue its writ of certiorari directed to the United States Circuit Court of Appeals for the Seventh Circuit, to review the judgment entered in this cause by said Circuit Court on the 18th day of December, 1945, and in respect of which the said Circuit Court denied petitioner's petition for rehearing on the 8th day of January, 1946.

Opinion Below.

The opinion of the Circuit Court of Appeals is annexed to the certified transcript of the record filed by petitioner herein. (R188)

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered December 18, 1945, and petitioner's petition for re-hearing was filed therein within ten days thereafter, but denied by the said Circuit Court on the 8th day of January, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U.S.C. Sec. 347 (a)).

Question Presented.

The cardinal question presented is the correctness or error of the following postulate, assumed and followed in the trial by the District Court for the Northern District of Indiana in a criminal cause and, in effect, enunciated by the Circuit Court of Appeals for the Seventh Circuit in affirming a judgment and sentence of petitioner:

Where a particular act is rendered criminal under a penal statute of the Congress, the doing of another act, not specifically denounced or prohibited, will be held within the intent of the statute and subject the actor to like punishment as if its commission were expressly prohibited and rendered punishable by the statute, if the act committed is calculated to produce the evil results which the Congress, by the statute, designed to avert.

The quintessential question is this: Are "constructive crimes" recognized under the Federal Criminal Code? Concretely stated and applied to this cause, as it was to petitioner's injury, it may be summarized as follows:

(a) The Price Control Act of 1942, (Chapter 26, 56 Stat. 23, Sec. 4 (a)), prohibited the sale of and penalized any person who sold or delivered any commodity in violation of any regulation or order of the Price Administrator.

(b) The Price Administrator promulgated a regulation (MPR 133) fixing "ceiling" *prices* on second-hand or used agricultural implements.

(c) The Price Administrator did not undertake in any manner to fix any "ceiling" *rentals* on agricultural implements, though he possessed the power to do so and, on the same day that he issued MPR 133, exercised that power in respect of many other implements. (MPR 134).

(d) The petitioner, an auctioneer, offered to farmers being in need of such implements, to let to them such implements for a period of ten years, title to remain in the petitioner's principal, the owner, and to be returned at the expiration of the bailment, the person making the highest bid for one year's hire to receive the bailment of the implement bid on. (R 20-41; R 46-80; R 82-90)

(e) The annual hire offered by the successful bailee, when multiplied by ten—the number of years expressed in the executed lease—exceeded the "ceiling" price for the implement established by MPR 133. (R 130-131)

(f) The petitioner did not settle the terms of the lease or participate in its execution nor in the receipt of any of the consideration paid by the bailee, though he did furnish blank contract forms to the owner's clerk before the auction, but at the auction petitioner's functions ended when he announced acceptance on behalf of the owner, of the highest *annual* rent offered, which in each instance was less than the "ceiling" price fixed by MPR 133. (R 118)

(g) The owner's clerk, over whom the petitioner had no control, on behalf of the owner, in each instance, exacted from the bailee not only the payment of one year's rental, but required and received payment by the bailee of the aggregate hire for the whole period of bailment to be paid in advance before delivery of the implement. (R 113-114)

HELD: Sufficient to establish the guilt of the petitioner under the charge that he

“did unlawfully, willfully and knowingly agree, solicit and offer to sell and did sell and deliver”
the implement in violation of MPR 133. (R153)

Statutes Involved.

The pertinent provisions of the Emergency Price Control Act of 1942 (56 Stat. 23, Chapt. 26; 50 U.S.C. 902-924) and the relevant provisions of Maximum Price Regulation No. 133, are as follows:

“Whenever in the judgment of the Price Administrator the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may, by regulation or order, establish such maximum price or maximum prices as, in his judgment, will be generally fair and equitable and will effectuate the purposes of this Act. * * * As used in the foregoing provisions of this subsection, the term ‘regulation or order’ means a regulation or order of general applicability and effect.” (Chapter 26, 56 Stat. 23 Sec. 2 (a).)

“Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.” (Sec. 2, sub-section (g) Chapter 26, 56 Stat. 23.)

“It shall be unlawful * * * for any person to sell or deliver any commodity * * * or otherwise to do or omit to do any act in violation of any regulation or order under Section 2, * * * or to offer, solicit, attempt, or agree to do any of the foregoing.” (Chapter 26, 56 Stat. 23, Sec. 4 (a).)

“Nothing in this Act shall be construed to require any person to sell any commodity * * *.” (Chapter 26, 56 Stat. 23, Sec. 4 (d).)

“Any person who willfully violates any provision of Section 4 of this Act * * * shall, upon conviction

thereof, be subject to a fine of not more than \$5,000.00 or to imprisonment for not more than * * * one year * * * or to both such fine and imprisonment." (Chapter 26, 56 Stat. 23, Sec. 205 (b).)

Applicable Parts of Maximum Price Regulation No. 133.

"1361.3a. Maximum prices for used equipment—
(a) Applicability of this section. This section is applicable to sales by all persons of the following items of used farm equipment:

- (1) Combines.
- (2) Corn binders.
- (3) Corn pickers.
- (4) Farm tractors (except crawler tractors).
- (5) Hay balers (motor or tractor operated).
- (6) Hay loaders.
- (7) Manure spreaders.
- (8) Side delivery rakes.
- (9) A combination of any of the items just listed

with other items of farm equipment specifically designed for mounting thereon, where the combination is sold as a unit.

This section is also applicable to sales by retail dealers of any complete item of used farm equipment. This section is not applicable to sales of used farm equipment parts.

(b) Maximum prices for sales by farmers, auctioneers, etc. The maximum price for a sale by a person, other than a retail dealer, of any item listed in sub-paragraphs (1) to (8), inclusive, of paragraph (a), shall be determined as follows: If the item is sold within one year after sale new, the maximum price shall be 85% of the 'base price'. In any other case, the maximum price shall be 70% of the 'base price'. In the case of a combination sale referred to in paragraph (a) (9), the maximum price for the combination shall be equal to the sum of the maximum prices of each of the items of farm equipment sold as a part of the combination. These maximum prices shall be determined in the manner just set forth.

(I) Base Price. The 'base price' which must be used in determining maximum prices shall be the first of the following which is available:

(i) The manufacturer's current suggested retail price for the item.

(ii) The last suggested retail price for the item that the manufacturer issued.

(iii) If the item never had a suggested retail price, the base price is the maximum price for which the same or nearest equivalent item would be sold new in the locality, minus carload freight from the plant of manufacturer of the item."

STATEMENT.

Petitioner was indicted under twelve separate counts of an indictment, each charging a distinct "sale", in violation of MPR 133, of a particularly described farm implement to a specified "purchaser" at a specified "price". He was found guilty on each count and sentenced to the custody of the Attorney General for a period of one year on each count (sentences to run concurrently) and to make his fine in the total sum of \$3,000.00.

The relevant evidence at the trial was undisputed as to each of the twelve counts, *i. e.*, that in each instance there was no sale of any property, but the petitioner, as auctioneer, offered the implement for rent for a period of ten years, and announced that the bidder making the highest bid for the rental for one year would enter into a lease agreement with the owner through the owner's Clerk. In each instance the successful bidder, fully understanding that he was not purchasing the implement but merely acquiring a bailment thereof, would repair to the clerk after making his successful bid, and with the clerk transact the remainder of the business. A written contract of bailment was then executed between the bailee and the owner through the clerk to the following tenor:

"LEASE OF EQUIPMENT.

The undersigned, hereinafter designated as 'the lessor' has let unto the undersigned, hereinafter designated 'the lessee' the following agricultural tools, machinery and equipment:

.....

1. The term of this lease is 10 years at an annual rental of Dollars, a total rental of Dollars. Of this amount the lessee has paid to the lessor Dollars, to leave a balance of no/ 100 Dollars owing on the rental for the remainder of the term. This balance shall be paid to the lessor in equal annual installments at the annual rate aforesaid, in advance, the first payment on this balance to be made on that anniversary date of this lease constituting the end of the period for which the advance rental payment has been this day paid to the lessor. If the lessee shall fail to pay the same when so due, the lessor shall resort to the deposit described in the next succeeding paragraph of this lease and draw thereon for the rental so falling due, and from year to year thereafter (in event of such continued non-payment) until the expiration of this lease.

2. The lessee has deposited with the lessor the sum of Dollars as security for the payment of the balance of the rentals herein called for and as security for the return, at the end of the term of this demise, of the chattels aforesaid, in as good a condition as they now are in, in full repair and state of efficient operability. The lessee undertakes, unconditionally and without exceptions, for himself, successors and assigns, the return of the chattels to the lessor in the condition aforesaid at the end of the demise. Provided, However, in no event shall the said lessee, his heirs, executors, administrators, assigns and successors be holden to any liability for breach of this covenant or any other provision of this lease in excess of the amount of deposit for security, as in this paragraph specified. Provided, Further, However, in event the deposit aforesaid or any part thereof of the advance rental payment or any part thereof is not paid in cash but evidenced by a promissory note or notes accepted by the lessor, nothing herein contained shall operate as any defense to, set off or counterclaim against or furnish any ground for postponement of the maturity date fixed by such note or notes,

and such note or notes shall be collectible in accordance with their tenor, wholly apart from and without regard to any limitation of liability on the lessee as herein expressed.

3. The lessee shall list the chattels as his property for taxation and pay and discharge when due any and all taxes and other governmental excises and exactions whatsoever on account of the ownership, operation, or this bailment of the said chattels, and hereby indemnifies and agrees to hold the lessor harmless therefrom.

4. The lessee may assign this lease, or sublet the chattels, but with such assignment shall pass to the assignee's debt account security all deposits made with the lessor, and such assignee shall then, without diminution of obligation, stand in the shoes of the lessee, and likewise every subsequent sublessee and assignee thereof. Should the lessee or his assigns at any time undertake to make disposition of the chattels, the purchaser in good faith shall, notwithstanding any lack of consent on the part of the lessor, take good title thereto as against the lessor, and the lessor shall then be entitled to full appropriation of the deposit for security in like manner as on the destruction of the chattels, and any unearned rentals in the hands of the lessor shall be deemed then fully earned.

5. No guarantees, representations or warranties whatsoever are made by the lessor to the lessee in relation to the chattels hereby let, it being understood that the lessee has examined the same and knows their character and quality.

Executed at, Indiana, this day
of, 194.....

.....
Lessor

(R80-81)

.....
Lessee."

In the blank spaces would be inserted the appropriate names of the bailor and bailee, respectively, the annual rental, the aggregate rental, the amount of the "deposit", the place of execution of the contract, the date of execution and the subscribing signatures of the respective parties, in the order as the blanks appear. In relation to the facts charged in two or three of the counts of the indictment the evidence disclosed that there were obvious errors of the scrivener in filling these blanks, but in every instance the intent of the successful bidder to acquire but a bailment and not title to the article described in the apropos count of the indictment is undisputed. (R20- R90; R101-11

The petitioner, at the conclusion of the evidence, requested that the Court direct the jury to find the petitioner not guilty. This the trial court refused to do and petitioner excepted. The petitioner also requested the court to instruct the jury as follows:

"If the defendant with that purpose and intent, leased, offered to lease, or solicited bids for leasing, the several items of farm machinery described in the several counts of the indictment, and did not offer them for sale, solicit bids for their sale, or make sale there, then he has committed no crime." (R154)

which instruction the trial court refused to give and the petitioner excepted. The petitioner also requested as part of the charge, that the court give the following instruction:

"There was not in effect, at the time of the alleged offenses charged in the several counts of the indictment herein, any regulation of the Price Administrator governing the maximum rental that shall be charged for the leasing of any of the items of farm equipment described in the indictment." (R155)

This instruction the court refused to give to the jury and the petitioner excepted. The trial court did not give any

instructions to the jury embodying the substance of any of these requests. The Circuit Court of Appeals in and for the Seventh Circuit declined to disturb the judgment and sentence holding,

"If the purported lease was simply a vehicle for the circumvention of the law, and the transaction was, in reality, a sale—not a lease—and the price received was over and above the maximum or ceiling price, then, such transaction would be in violation of the law and regulation if done knowingly, intentionally and willfully. It cannot be denied that the amount received by the owner of the implements—whether it be termed rental or sale price—was greatly in excess of the maximum or ceiling sale price of such implements. A careful examination of the 'lease' and of the evidence leaves no doubt that the transactions were a willful attempt upon the part of the defendants to circumvent and evade the law and regulation, that such transactions were outright sales, and not leases, and were in excess of the maximum or ceiling prices as fixed by the law and regulation." (R192 - R193)

Reasons for Granting the Writ.

Petitioner believes the record in this cause, on the basis of the foregoing statement thereof, adequately calls for the intervention of this court to annul a judgment of the Circuit Court of Appeals for the Seventh Circuit involving a federal question of criminal jurisprudence determined thereby in a way probably in conflict with the applicable decisions of this Court, as envisaged by Rule 38, section 5, sub-section (b) of the Rules of this Court, and petitioner asks this Court to refer to the brief of petitioner annexed hereto as appendix in support of petitioner's position.

It is respectfully submitted that this petition for writ of certiorari should be granted.

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